Filed 7/17/20 In re Chloe S. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re CHLOE S. et al., Persons Coming Under the Juvenile Court Law.	B303378 (Los Angeles County Super. Ct. No. DK17698)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CHRISTOPHER S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Lisa A. Brackelmanns, Juvenile Court Referee. Affirmed.

Christine E. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

Christopher S. (Father) appeals from the juvenile court's order terminating his parental rights to 12-year-old Chloe, 11-year-old Chelsea, and seven-year-old Christopher S. under Welfare and Institutions Code section 366.26.[1] Father's sole contention on appeal is that the Los Angeles County Department of Children and Family Services (the Department) and the juvenile court failed to comply with the inquiry and notice provisions of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.; ICWA). Because the Department was not required to provide notice under ICWA or California law (as amended effective January 1, 2019), we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Petition and Filing of Parental Notification of Indian Status Forms*

On June 2, 2016 the Department filed a petition on behalf of Chloe, Chelsea, and Christopher under section 300, subdivisions (b)(1) and (j), alleging Gloria L. (Mother) had endangered Christopher by failing to provide him with appropriate supervision and Mother and Father maintained a

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

filthy, unsanitary, and hazardous home, placing all three children at risk of serious harm.[2] The petition was later amended to allege Mother had a history of illicit substance abuse and was a current user of methamphetamine.

On June 2, 2016 Father filed a parental notification of Indian status form (ICWA-020) stating he "may have Indian ancestry from both paternal grandparents," identifying the Cherokee tribe. On the same date Mother filed a parental notification of Indian status form stating she "may have Indian ancestry," but not indicating a specific tribe. At the detention hearing, Father indicated paternal grandfather F.K. was a member of the Cherokee tribe or Waxahatchee tribe, which was related to the Creek Nation tribe. Father stated F.K. might have more information. Mother indicated maternal grandfather or aunt Cheryl might have more information on the children's Indian ancestry.

The court ordered the Department to perform a full investigation as to Mother and Father, including for Father, the Cherokee, Waxahatchee, and Creek Nation tribes.[3] The court ordered the Department to provide notice under ICWA to the three tribes for Father.

On December 8, 2016 Mother and Father pleaded no contest to the allegations they maintained a hazardous home and Mother had used illicit substances. The juvenile court sustained

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[2] Mother is not a party to this appeal.

[3] The Department later confirmed with the maternal grandfather that Mother did not have Indian ancestry. On appeal Father only raises an ICWA issue as to his ancestry.

the allegations and declared Chloe, Chelsea, and Christopher dependents of the court under section 300, subdivision (b)(1).

B. *The Department's Investigation and Mailing of Multiple ICWA Notices*

On July 12, 2016 the Department mailed ICWA notices for each child to the Bureau of Indian Affairs and the Secretary of the Interior. The notices provided contact information for Mother and Father, but it listed the children's relatives as "unknown" and did not provide the name of any possible tribes. On August 29, 2016 the social worker spoke with paternal grandfather F.K., who "confirmed that he is a registered member of either [the] Cherokee or Creek Nation, but he could not remember which one. However, his father had his registration number and has passed away." F.K. was not sure if there were other family members who had information on his tribal membership.

On August 31, 2016 the Department mailed a second set of ICWA notices for the three children, this time stating the name of the paternal grandmother (Terry H.) and paternal grandfather (F.K.) and date and place of their birth (in Alabama). The notices also included the names of the paternal great-grandmother and paternal great-grandfather, with the place of birth in West Virginia. The notices listed 13 tribes and bands with which Father might be affiliated. The notices were mailed to the Bureau of Indian Affairs, the Secretary of the Interior, and the 13 tribes.

Status reports prepared by the Department following the adjudication and disposition hearing stated ICWA did not apply. However, at a March 5, 2018 review hearing, the juvenile court

noted the Department mailed ICWA notices in a case involving Father's other child, which included additional information for Father. The court ordered the Department to send a third set of ICWA notices to the same tribes including the additional information.

At the October 23, 2018 hearing, the juvenile court acknowledged the Department had mailed the third set of notices to the appropriate tribes and the notices had been received. However, only three tribes responded, each of which stated the children were not members of the tribe or eligible for membership. The court found ICWA did not apply because more than 60 days had passed since the tribes had received notice. However, the court continued the selection and implementation hearing to allow the Department to send notices again to the tribes that had not responded. When the Department's attorney inquired why it was required to send additional ICWA notices given the court's finding ICWA did not apply, the court responded it was requiring it based on "a recent training that [the court] had stating that that should be done."

On November 16, 2018 the Department sent a fourth set of ICWA notices to the tribes that had not responded. The Department also submitted receipts showing the tribes received the notices. At the continued section 366.26 hearing, Father objected to the court terminating parental rights, arguing three tribes had still not fully responded to the fourth set of ICWA notices. Father also argued the fourth set of notices were defective because they indicated the case was set for a hearing on a section 388 petition, not a section 366.26 hearing on termination of parental rights. Finally, Father's attorney asserted the fourth set of notices did not provide F.K.'s contact

information, even though his address and telephone number were known.

After taking a recess and reviewing the fourth set of ICWA notices, the court noted the Department interviewed F.K. in September 2016 but had not asked for his current address. The court ordered the Department to interview F.K. again and mail a fifth set of notices to all eight Cherokee and Creek Nation tribes that included F.K.'s current address and stated the notice was for a section 366.26 permanency planning hearing.

On January 29, 2019 the social worker spoke with F.K., who provided the names of paternal great-grandmother Opal M., paternal great-great-grandfather Francis K. S. (born in 1880), paternal great-great-great-grandmother Rachel S. (born in 1843) and paternal great-great-great grandfather James S. S. (born in 1853). F.K. also provided phone numbers for his sister Betty M., maternal aunt Betty M.-M., and F.K.'s niece by marriage, Leita M.

Betty M. stated she had heard the family was 1/16 Indian heritage, but she did not know the tribe or whether the family was registered. Betty M.-M. told the social worker she believed the family had Cherokee ancestry, but she did not know if anyone was registered. Leita M. reported she had heard the family had Indian heritage, but her mother would have the information. Leita would not give the social worker her mother's contact information, but she stated she would try to contact her mother and have her call the social worker. Leita did not call or return any of the four messages left by the social worker.

The Department mailed the fifth set of ICWA notices to six tribes on February 13, 2019. The notices provided the names and contact information for Father, F.K. (including his address), the

names of the paternal grandmother, great-grandmother, and great-grandfather, listing for each possible membership in six tribes, and the names, addresses, and contact information for Betty M., Leita M., and Betty M.-M. Four tribes responded the children were not Indian children because neither the children nor their relatives were members or enrolled in the tribe. Two tribes did not respond, but the Department submitted certified receipts showing they had received the notices.

After further investigation, on May 10, 2019 the Department sent a sixth set of ICWA notices to eight tribes, containing the same information as the fifth set of notices, but adding the name of paternal great-great grandmother Ally S. This time three tribes responded, stating the children were not registered or eligible to register in the tribes. Five tribes did not respond to the notices, but the Department submitted certified receipts showing the tribes had received the notices.

C. *Section 366.26 Hearing and Termination of Parental Rights*

On December 11 and 12, 2019 the juvenile court held a contested selection and implementation hearing. (§ 366.26.) The court found by clear and convincing evidence Chloe, Chelsea, and Christopher were adoptable, no exceptions to adoption applied, and it would be detrimental to return the children to their parents. At the conclusion of the hearing the Department requested the court make a finding ICWA did not apply to the children and notice to the tribes was proper. All counsel submitted. The court stated, "The court is once again going to find that the court has no reason to know that ICWA applies in this case." The court also found notice to the tribes was proper.

The court terminated Mother's and Father's parental rights over the children.

Father timely appealed.

DISCUSSION

A. *ICWA's Notice Requirements*

ICWA provides as to dependency proceedings, "[W]here the court knows or has reason to know that an Indian child is involved, the party seeking . . . termination of parental rights to . . . an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a); see *In re Isaiah W.* (2016) 1 Cal.5th 1, 5; *In re A.M.* (2020) 47 Cal.App.5th 303, 315 (*A.M.*); *In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 784 (*Elizabeth M.*).) California law similarly requires notice to the Indian tribe and the parent, legal guardian, or Indian custodian if the court or the Department "knows or has reason to know" the proceeding concerns an Indian child. (Welf. & Inst. Code, § 224.3, subd. (a); see *Elizabeth M.*, at p. 784; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 649.)

The notice requirement is at the heart of ICWA because it "enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the proceeding. No foster care placement or termination of parental rights proceeding may be held until at least 10 days after the tribe receives the required notice." (*In re Isaiah W., supra*, 1 Cal.5th at p. 5; accord, *In re N.G.* (2018) 27 Cal.App.5th 474,

480; see 25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.3, subd. (d).)

ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); see Welf. & Inst. Code, § 224.1, subd. (a) [incorporating federal definitions].) Under ICWA's regulations, a juvenile court has "reason to know" a child is an Indian child if one of six circumstances is present: "(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child; [¶] (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child; [¶] (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child; [¶] (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village; [¶] (5) The court is informed that the child is or has been a ward of a Tribal court; or [¶] (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe." (25 C.F.R. § 23.107(c) (2020).)

Prior to January 1, 2019, former section 224.3, subdivision (b)(1), provided enhanced ICWA notice requirements, including as circumstances that may constitute reason to know a child is an Indian child the receipt of information "suggesting the child is a member of a tribe or eligible for membership in a tribe or one or

more of the child's biological parents, grandparents or great-grandparents are or were a member of a tribe." (See *Elizabeth M., supra*, 19 Cal.App.5th at p. 784; *In re Breanna S., supra*, 8 Cal.App.5th at p. 650.)

However, Assembly Bill No. 3176 (2017–2018 Reg. Sess.) amended the definition in section 224.2, subdivision (d)(1), effective January 1, 2019, of when the court has "reason to know" a child is an Indian child, conforming California law to the ICWA regulations and deleting the language in former section 224.3, subdivision (b)(1).[4] (*In re Austin J.* (2020) 47 Cal.App.5th 870, 884-885, 887 (*Austin J.*) [Department was not required to inquire further into children's Indian ancestry based on mother's statements she may have Cherokee ancestry because the statements only created a possibility the children had Cherokee ancestry]; *A.M., supra*, 47 Cal.App.5th at pp. 316, 322 [mother's statement on parental notification of Indian status form that she may be a member of or eligible for membership in a recognized Indian tribe and that one of her lineal ancestors is or was a member of a federally recognized tribe required further inquiry by department into children's Indian ancestry but did not trigger notice requirement where father's relatives were deceased].)[5]

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[4] In contrast to the notice requirement, the juvenile court and the Department "have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . may be or has been filed, *is or may be* an Indian child." (§ 224.2, subd. (a), italics added; see *A.M., supra*, 47 Cal.App.5th at pp. 316-317.)

[5] As Father acknowledges, because he is appealing from the December 12, 2019 termination of his parental rights, which

"[W]here the facts are undisputed, we independently determine whether ICWA's requirements have been satisfied." (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1051; accord, *A.M., supra*, 47 Cal.App.5th at p. 314.) "However, we review the juvenile court's ICWA findings under the substantial evidence test, which requires us to determine if reasonable, credible evidence of solid value supports the court's order. [Citations.] We must uphold the court's orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we resolve all conflicts in favor of affirmance." (*A.M.*, at p. 314; accord, *Austin J., supra*, 47 Cal.App.5th at p. 885.) The parent who is appealing "'has the burden to show that the evidence was not sufficient to support the findings and orders.'" (*Austin J.*, at p. 885.)

B. *The Department Was Not Required To Mail ICWA Notices to the Cherokee and Creek Nation Tribes*

The Department contends it had no obligation to mail notices to the tribes because it had no "reason to know" the children were Indian children. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.3, subd. (a); *In re Isaiah W., supra*, 1 Cal.5th at p. 5; *A.M., supra*, 47 Cal.App.5th at p. 315.) The Department argues there was no information presented to the juvenile court or the Department that the children were Indian children, but rather,

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occurred after the effective date of the amendments to section 224.3, the amended provisions apply here. (See *A.M., supra*, 47 Cal.App.5th at p. 321 ["Since Mother is appealing from the findings made at the September 6, 2019 section 366.26 hearing . . . , the current ICWA statutes apply."].)

the available information only suggested the children might have Indian ancestry. The Department is correct.

Father stated he "may" have Indian ancestry, which is not sufficient under ICWA or California law to trigger the notice requirement. (*Austin J., supra*, 47 Cal.App.5th at pp. 886-887; *A.M., supra*, 47 Cal.App.5th at p. 322.) As the Court of Appeal in *Austin J.* explained on similar facts, "At most, these statements merely suggest the possibility that the children may have Cherokee ancestry; Indian ancestry, however, is not among the statutory criteria for determining whether there is a reason to know a child is an Indian child. The statements, therefore, do not constitute information that a child 'is an Indian child' or information indicating that the child is an Indian child, as is now required under both California and federal law." (*Austin J.*, at p. 887; see *A.M.*, at p. 321 ["At most, Mother had provided information indicating she may have Indian heritage. Although it would follow that the children might also have some Indian heritage, the information Mother provided to DPSS did not rise to the level of 'information indicating that the child[ren] [are] . . . Indian child[ren].'"].)

The fact paternal grandfather F.K. stated to the social worker he was a registered member of the Cherokee or Creek Nation was similarly not sufficient to trigger the requirement for ICWA notice. The grandfather's membership in an Indian tribe would have been sufficient to require notice under former section 224.3, subdivision (b)(1), but absent evidence Father or the children were members of an Indian tribe, grandfather's membership did not trigger the notice requirement under ICWA

(see 25 C.F.R. § 23.107(c) (2020)) or amended section 224.2, subdivision (d).[6]

Because the Department was not required to provide notices to the tribes, we do not reach Father's arguments the notices lacked required information about family members within the Department's possession; the Department failed to obtain and include information about family members that was easily

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[6] In his reply brief, Father argues the juvenile court's order requiring the Department to provide a sixth set of notices, which occurred after the change of law on January 1, 2019, means the court implicitly found there was reason to know the children were Indian children. But at the section 366.26 hearing the court explicitly found ICWA did not apply. That the court ordered mailing of a sixth set of notices in an abundance of caution does not mean it was required to do so. Father's argument the Department forfeited its argument ICWA notice was not required by failing to object to the court requiring mailing of a sixth set of notices or appealing the court's order requiring notice also lacks merit. At the conclusion of the section 366.26 hearing the Department specifically requested the court make a finding ICWA did not apply to the children and notice to the tribes was proper. The court agreed with the Department and made both findings. Father cites no authority for the proposition the Department should have (or could have) appealed the court's prior order requiring mailing of the sixth set of notices. *Puritan Leasing Co. v. August* (1976) 16 Cal.3d 451, 463, relied on by Father, does not support a contrary result. The Supreme Court in *Puritan Leasing* held that an issue resolved by entry of a directed verdict against the defendants could not be raised in response to the plaintiff's appeal absent the filing of a cross-appeal. (*Ibid*.) Here, there was no basis for the Department to appeal the juvenile court's favorable ruling at the section 366.26 hearing that ICWA did not apply and notice was proper.

obtainable; and the Department mailed the notices to the incorrect tribal agents for service.

DISPOSITION

The order terminating Father's parental rights under section 366.26 is affirmed.

FEUER, J.

We concur:

PERLUSS, P. J.

SEGAL, J.